1987

State of Utah v. Richard S. Johnson : Brief of Respondent

Utah Supreme Court

David L. Wilkinson; Attorney General; Kimberly K. Hornak; Assistant Attorney General; Attorneys for Respondent.
Deirdre A. Gorman; Attorney for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, : Case No. ~~850041~~

v. : 870041

RICHARD S. JOHNSON, : Category No. 2

Defendant-Apellant. :

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF FIRST DEGREE MURDER, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DAVID ROTH, JUDGE, PRESIDING.

DAVID L. WILKINSON
Attorney General
KIMBERLY K. HORNAK
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

DEIRDRE A. GORMAN
Attorney at Law
205 26th Street
Suite 34
Ogden, Utah 84401

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860041
v.	:	
RICHARD S. JOHNSON,	:	Category No. 2
Defendant-Apellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF FIRST DEGREE MURDER, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DAVID ROTH, JUDGE, PRESIDING.

DAVID L. WILKINSON
Attorney General
KIMBERLY K. HORNAK
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

DEIRDRE A. GORMAN
Attorney at Law
205 26th Street
Suite 34
Ogden, Utah 84401

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES AND RULES

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860041
v.	:	
RICHARD S. JOHNSON,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

JURISDICTION

This appeal is from a conviction of first degree murder after a trial in the Second District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2-2(3)(h) (1987).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court err in admitting evidence of a criminal conspiracy relating to the distribution of cocaine?

2. Did the trial court err in not granting defendant's motion to dismiss the aggravating factor of pecuniary gain?

3. Should the trial court have given defendant's requested jury instruction on reasonable doubt?

4. Did the trial court err in giving the state's requested jury instruction on the lesser included offense of second degree murder?

5. Did the state present sufficient evidence to convict defendant of first degree murder?

6. Did the prosecutor misstate evidence in his closing argument such that defendant was prejudiced?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Rule 801, Utah R. of Evid. provides:

> (d) Statements which are not hearsay. A statement is not hearsay if:
>
> . . . .
>
> (2) Admission by party-opponent. the statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

Defendant, Richard S. Johnson, was charged by information with one count of first degree murder, a capital felony, under Utah Code Ann. § 76-5-202 (Supp. 1987) (R. 1). After a jury trial, defendant was found guilty as charged (R. 193). Once a penalty hearing had been completed, Judge Roth sentenced defendant to life in prison (R. 134).

STATEMENT OF FACTS

In November, 1985 the defendant, Randy Johnson, Brook Evertson, and Scott Taren met to discuss the formation of a cocaine distribution business (R. 437, 440). The victim, Piti Srisi-Ad would pick up the cocaine, the defendant and Randy would distribute it and Brook would put up the money (R. 441). Randy distributed cocaine to David Wardrop until approximately December, 1985 (R. 401). Between December, 1985 and May, 1986 Randy distributed cocaine to John Montoya who distributed it to David among other people (R. 352).

During this time period defendant was also interested in opening a body shop wherein Piti would be working with

defendant painting cars (R. 277). Defendant took out a life insurance policy on Piti in the amount of $100,000 and in January, 1986 changed the amount to $200,000 (R. 279). Defendant purchased the policy to protect defendant's interest in the drug business and his body shop.

In February, 1986 defendant started to have problems with Piti. Piti refused to distribute cocaine to defendant (R. 403); defendant thought Piti was a "narc" (R. 468, 484, 589); and defendant claimed that Piti owed him money (R. 356, 444, 483, 520). As a result of these problems and the large amount of life insurance defendant had on Piti, defendant attempted to hire Brad Bromage and Lloyd Averett to kill Piti (R. 522, 575). Defendant offered Bromage $10,000, a quarter pound of cocaine, and a job with defendant's business if Bromage would kill Piti (R. 522). Defendant offered to pay Averett $6000, a quarter pound of cocaine, and a corvette if he killed Piti (R. 576).

When it became clear that Averett and Bromage would not kill Piti, defendant offered Jim Smith $3,000, a quarter pound of cocaine, a new house, a customized corvette worth approximately $45,000, and part of defendant's business to kill Piti (R. 731, 785). Defendant also told Smith that if he did not kill Piti that Smith and his family would be killed (R. 637). Additionally, defendant stated that he wanted Piti killed by May 16, 1987 (R. 641).

On the night of May 15, 1986, Piti and approximately five other people were at Kevin Wakely's house in Ogden, Utah smoking marijuana (R. 646). Piti indicated that he knew where he

could purchase an ounce of cocaine and Jim Smith stated that he also knew where cocaine could be purchased (R. 647). Smith used this information as a ploy to get Piti into Smith's car (R. 647).

At approximately 4:00 a.m. on May 16, 1986 Piti and Smith left Wakely's house to make the purchase (R. 648). Smith stopped at a stop sign and when Piti looked away from Smith, Smith shot Piti in the head instantly killing him (648). Smith subsequently dropped Piti's body on Larson Lane in Ogden (R. 245, 649).

Smith was subsequently arrested for the murder of Piti (R. 655). Initially, Smith told the officers that Brad Bromage and Lloyd Averett were responsible for the murder and that Smith was merely a passenger in the car (R. 656). After consulting with his attorney, Smith stated that defendant had hired Smith to kill Piti (R. 656).

At trial, the jury found defendant guilty of one count of capital murder. After a penalty hearing, the judge returned a life sentence. Other pertinent facts are found in the argument portion of this brief.

SUMMARY OF ARGUMENT

The trial court did not err in admitting evidence of a criminal conspiracy. The majority of the testimony pertaining to the conspiracy was based upon observations of the witnesses and statements made by defendant and thus was not true hearsay. Additionally, the evidence was relevant to prove defendant's motive in wanting the victim killed.

It was not reversible error for the trial court to deny defendant's motion to dismiss the aggravating circumstance of pecuniary gain on the ground that an accomplice instruction was not given. Arguably, an accomplice instruction to the jury was not necessary since § 76-5-202 does not require by definition that defendant actually pull the trigger causing the death of the victim. In any event, since the jury found by special verdict that defendant was also guilty of another aggravating circumstance not challenged by defendant, this Court need not address the pecuniary gain circumstance.

No error occurred when the lower court refused to give defendant's requested instruction on reasonable doubt. The instructions given accurately stated the law and did not deny defendant due process.

Because all of the various degrees of homicide have the relationship of greater and lesser offenses, the lower court did not err when it gave the state's requested instruction on second degree murder.

Viewed in the light most favorable to the jury verdict, sufficient evidence was presented to show that defendant hired James Smith to kill the victim.

No prosecutorial error warranting reversal. First, it is not clear that the prosecutor misstated evidence presented at trial. Assuming arguendo that the prosecutor did misstate the evidence the jury was instructed that his closing argument was not evidence in the case. Additionally, there is no indication that the jury was so prejudiced that there would have been a more favorable result absent the misstatement.

ARGUMENT

POINT I

THE LOWER COURT DID NOT ERR IN ADMITTING TESTIMONY OF A CRIMINAL CONSPIRACY.

Defendant claims the lower court erred in admitting evidence of a criminal conspiracy to sell drugs involving defendant, the victim, and other participants pursuant to Utah R. Evid. 801(d)(2)(e) (1987). First, defendant complains the state failed to introduce independent evidence of a criminal conspiracy and thus under State v. Gray, 717 P.2d 1313 (Utah 1986) the testimony of a conspiracy was inadmissible. Second, defendant claims that the evidence was not relevant.

It is well established that this Court should not "disturb the ruling of the trial court on questions of admissibility of evidence unless it clearly appears that the lower court was in error." State v. Gallegos, 712 P.2d 207, 208-209 (Utah 1985) (citations omitted). This Court has stated that "[t]he trial court's ruling on the admissibility of evidence will not be reversed absent a showing that the trial court so abused its discretion as to create a likelihood that injustice resulted." State v. Royball, 710 P.2d 168, 169 (Utah 1985).

This Court has stated that:

> To utilize the exception, [Utah R. Evid. 801(d)(2)(E)] the State must introduce evidence independent and exclusive of the conspirator's hearsay statements themselves, showing the existence of a criminal joint venture and the defendant's participation therein. Independent evidence of the declarant's membership in the criminal venture is also required. 'Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence'.

State v. Gray, 717 P.2d 1313, 1318 (Utah 1986) (citations omitted).

However, this exception is applicable only to out-of-court statements by a co-conspirator, and not to the recounting of observations of a co-conspirator. As this Court stated in Gray, "the circumstances surrounding these transactions was clearly a recounting of what Imani herself had observed and not what she had heard." Id. at 1316.

In this case, many of the witnesses testified to their own observations and to defendant's statements regarding a drug conspiracy. John Montoya testified that he received deliveries of cocaine from the group composed of "Pete, Rick, Randy, and Scott," and that the group was involved in the distribution of cocaine (R. 351-53). Scott Taren testified to a meeting he observed and participated in wherein Rick Johnson and Randy Johnson would distribute cocaine, Brook Evertson would put up the money, and Scott would keep the books (R. 437-441). Randy Johnson testified he and the victim persuaded defendant to give them money to start a drug business, and that defendant did give Randy $5,000 to buy cocaine (R. 925-26). All of this testimony was not composed of hearsay statements by coconspirators but instead detailed statements made by defendant and observations of the witnesses. Finally, defendant admitted being involved in a conspiracy to sell cocaine (R. 467, 1223-24). Thus, it is difficult to see how he can claim error.

Second, defendant contends that the hearsay evidence as to the conspiracy was irrelevant. In this case, the victim had the drug connection for the conspiracy; defendant and other participants in the conspiracy would give money to the victim with the expectation that he would purchase the cocaine (R. 376, 443). As a result of the cocaine business, the victim owed defendant money which the victim never spent on cocaine (R. 356, 483, 520, 1385). Defendant was also concerned that the victim was terminating his supply of cocaine to the defendant (R. 403). Additionally, defendant indicated that he thought the victim was a "narc" (R. 484, 589) and therefore, he could ruin the cocaine business. Finally, defendant attempted to get all participants involved in the cocaine business to obtain life insurance policies (R. 1195), and defendant paid the premiums on the victim's insurance policy (R. 1207). It is clear from the evidence offered to establish a conspiracy that the victim's drug contact and involvement in the cocaine business was relevant in establishing defendant's motive for having the victim killed. The evidence establishing a conspiracy laid the ground work for why defendant hired Smith to kill Piti and what defendant had to gain by the death.

Even assuming the offered evidence was improperly admitted because it was inadmissible hearsay and irrelevant, defendant has failed to prove any prejudice. Utah R. Evid. 103 (1986) provides in part that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Error is reversible only

if a review of the record persuades the court that without the error there was "a reasonable likelihood of a more favorable result for the defendant." State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984)(citations omitted). Because defendant admitted being involved in the cocaine business and sufficient evidence was introduced to prove that he hired Smith to murder Piti any error was harmless and would not have resulted in a different verdict.

POINT II

NO ERROR OCCURRED IN THE TRIAL COURT'S FAILURE TO DISMISS THE AGGRAVATING CIRCUMSTANCE CHARGED UNDER UTAH CODE ANN. § 76-5-202(f).

Defendant was charged with first degree murder as follows:

> Said defendant intentionally or knowingly caused the death of Piti Srisa-Ad under the following circumstances:
> (a) The defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide.
> (b) The homicide was committed for pecuniary or other personal gain.

(R. 1).

At trial, defendant moved to dismiss the aggravating circumstance that the homicide was committed for pecuniary or other personal gain. The following exchange took place:

> MR. PERKINS: Yes, your Honor. If the Court please, Mr. Johnson is charged under two different sections, statutes, under 76-5-202. They have, according to the Information, they have under category A, the defendant committed or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide.

> Then they have a second one. They have the homicide was committed for pecuniary or other personal gain.
>
> Now as a prerequisite, both of them, said Defendant intentionally or knowingly caused the death of Piti Srisi-Ad under the following circumstances. At this point in time, under the second predicate, B, that I have made reference to, there is anything but a showing that Mr. Johnson did anything to intentionally or knowingly cause the death of Piti Srisi-Ad with a homicide being committed for pecuniary or personal gain. That is a causal relationship that he intentionally or knowingly caused. The evidence is contrary to Rick Johnson having intentionally or knowingly caused the death for the pecuniary or personal gain from Rick Johnson. Therefore, I think to carry forward with sub-section B, is inappropriate. That particular provision should be stricken.
>
> That the only remaining issue would be that under issue A regarding whether or not it was basically a contract for hire. I think that's the only issue that fits into the knowingly and intentionally. And therefore we move to dismiss paren B from the Information.
>
> THE COURT: Motion is denied. The evidence at this point would support a finding that the defendant hired somebody to cause the death of the victim for pecuniary gain, being to collect the insurance.

(R. 825-26).

Defendant now claims on appeal that since he did not actually kill the victim, that he could not be found guilty of a homicide committed for personal gain without an accomplice

instruction to the jury[1].

Arguably, an accomplice instruction was unnecessary in this case. Utah Code Ann. § 76-5-202(1) provides that "[c]riminal homicide constitutes murder in the first degree if the actor intentionally or knowingly causes the death of another under any of the following circumstances . . . ." Utah Code Ann. § 76-2-103 (1978) defines intentionally and knowingly as follows:

> (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (2) Knowingly, or with knowledge, with respect to this conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Nothing in either the definition of first degree murder or intentionally or knowingly requires that the defendant actually commit the act which results in the homicide. All that is required is that defendant has a "conscious objective" or "is aware that his conduct is reasonably certain" to "cause the result (the homicide)."

---

[1] Utah Code Ann. § 76-2-202 (1978) is the pertinent statute regarding criminal responsibility for the conduct of another. This statute provides:

> 76-2-202. Criminal responsibility for direct commission of offense or for conduct of another.--Every person, acting with the mental state required for the commission of an offense who directly commits this offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

In this case, the defendant intended to cause Piti's death by hiring Smith to kill Piti. Defendant's actions in hiring Smith was a direct cause of Piti's death. But for defendant's actions, Piti would not have been killed. Simply because defendant did not pull the trigger, defendant's hiring of Smith was the cause of the death and defendant is just as guilty as if he did pull the trigger. Under this theory, no accomplice instruction was necessary.

In any event, this Court need not reach the issue of whether an accomplice instruction was necessary since the jury also found that defendant was guilty of first degree murder under an additional aggravating circumstance not challenged by the defendant. The jury specifically found that the defendant "engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide" (R. 193). Because of this finding by the jury, this Court may affirm the verdict without addressing the issue of whether an accomplice instruction should have been given on the pecuniary gain aggravating circumstance. State v. Shaffer, 725 P.2d 1301, 1307 (Utah 1986).

POINT III

THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO GIVE DEFENDANT'S REQUESTED JURY INSTRUCTION ON REASONABLE DOUBT.

At trial, the following instructions on reasonable doubt were given to the jury:

Instruction No. 11

> Proof beyond a reasonable doubt is that degree of proof that satisfies the mind and convinces the understanding of those who are bound to act conscientiously upon it. It must arise from the evidence or lack of evidence in the case.
>
> If, after an impartial consideration and comparison of all the evidence, you can honestly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial consideration and comparison of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Instruction 12

> The law does not require demonstration of that degree of proof which, exclusing all possibility of error, produces absolute certainty, for such degree of proof is rarely possible. Only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it.

(R. 147, 148).

Defendant objects to instruction #12 claiming that it "unfairly clarifies reasonable doubt in favor of the prosecution as it is slanted toward conviction and not acquittal because there is not a corresponding clause as to when the 'doubt' is not enough." (R. 1660, Br. of App. at 25). To balance instruction #12 defendant requested the following instruction:

> Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is the state of the case which after the entire comparison and consideration of all of the evidence leaves the mind of the Jurors in that condition that they cannot say they feel an

> abiding conviction to a moral certainty of the truth of the charge.

(R. 1661). The trial court refused to give defendant's requested instruction (R. 1732).

This Court has stated that where a requested instruction is denied, no prejudicial error occurs if it appears that the giving of the instruction would not have affected the outcome of the trial. Additionally, a defendant is not entitled to an instruction which is repetitive of principles stated in other instructions given to the jury. State v. McCumber, 622 P.2d 353, 359 (Utah 1980). "[T]here is no apparent reason to mandate that one, and only one, particular instruction be used by trial judges in conveying to the jury the meaning of that elusive phrase, 'proof beyond a reasonable doubt.'" State v. Eagle, 611 P.2d 1211 (Utah 1980).

Defendant correctly cites State v. Wilks, 25 Utah 2d 22, 474 P.2d 733 (1970) for the following proposition:

> When instructions are given which clearly and positively state what must be proved before a conviction can be had and the jury told that they must acquit unless each and every element is established by the evidence and beyond a reasonable doubt, it is not necessary to give another instruction in negative form. . . .

Id. at 735. Defendant however claims that Wilks is distinguishable from the instant case because "when instruction Number 12 was given, there were then two instructions to the positive and only one to the negative now unfairly weighing 'reasonable doubt' to the prejudice of the defendant." (Br. of App. at 28).

Defendant appears to be playing a numbers game with the court. At no time does defendant contend that either instruction #11 or #12 shifted the burden of proof to the defendant or that the language denied defendant due process. State v. Tillman, 72 Utah Adv. Rep. 6, 20 (Dec. 22, 1987). Instead defendant contends that instruction #12 should have been countered with an instruction slanted towards defendant.

Defendant makes no allegation that if his proposed instruction had been given the result of the trial would have been different. Additional instructions stated that the burden of proof was on the State and that defendant was presumed innocent unless the State proved all elements of the crime beyond a reasonable doubt (R. 136, 139). No error occurred in the denial of the requested instruction.

POINT IV

THE TRIAL COURT DID NOT ERR IN GIVING AN INSTRUCTION TO THE JURY ON SECOND DEGREE MURDER.

Defendant claims that under the Baker[2] test the elements of second degree murder were not necessarily included within the charged offense of first degree murder and thus the trial court erred in giving an instruction on second degree murder. The error from giving such an instruction, defendant claims, is that the jury was prejudiced towards convicting him. (Br. of App. at 31).

---

[2] State v. Baker, 671 P.2d 152 (Utah 1983).

Under Baker, when the prosecution requests a lesser included offense instruction then "both the legal elements and the actual evidence or inferences needed to demonstrate those elements must necessarily be included within the original charged offense." State v. Baker, 671 P.2d 152, 156 (Utah 1983). "In other words, an instruction on the lesser offense should be given at the prosecution's request only if the greater offense could not be committed without also committing the lesser offense." State v. Hansen, 734 P.2d 421, 424 n. 5 (Utah 1986).

This Court established in State v. Crick, 675 P.2d 527, 530 (Utah 1983) that "all of the various degrees of homicide have the relationship of greater and lesser included offenses." This conclusion is based upon Utah Code Ann. § 76-1-402(3)(c) (1978) which provides that an offense is included when it is specifically designated by a statute as a lesser included offense. This Court concluded in Crick that Utah Code Ann. § 76-5-201 and the succeeding sections under the heading of "criminal homicide" (through § 76-5-207) amount to such a designation. As this court stated in Crick:

> Section 76-5-201 provides:
>
> (1) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence unlawfully causes the death of another.
>
> (2) Criminal homicide is murder in the first and second degree, manslaughter or negligent homicide, or automobile homicide.
>
> In the succeeding sections, the Code sets out the statutory definitions of the various types of criminal homicide, each (except for automobile homicide) in descending order of seriousness. This structure--notably the

> identification of the crime of criminal homicide and the specification of common elements in § 76-5-201, and the relationships inherent in the succeeding sections--fulfills the § 76-1-402(3)(c) requirement of specific (statutory) designation of a lesser included offense. Consequently, all of the various degrees of homicide have the relationship of greater and lesser included offenses. . . .

Id. at 530 (citations omitted).

Defendant claims that the second degree murder instruction was improper because if the jury found that defendant did not hire Smith to kill the victim, and as such was not guilty of first degree murder, then defendant was innocent of any wrongdoing (Br. of App. at 30-31). Defendant bases his argument in part upon the evidence presented at trial that Smith, not defendant, was the one who actually killed the victim. Defendant's argument is without merit.

First, it is interesting to note that while defendant argues that he could not be found guilty of second degree murder because he did not do the actual killing, defendant requested a lesser included instruction on manslaughter at trial (R. 1663). Defendant's argument in regards to the second degree murder instruction is equally applicable to a manslaughter instruction. Second, assuming the jury found that defendant did not hire Smith to kill the victim, the jury could still have found that defendant intentionally or knowingly killed the victim in that defendant planned and assisted in the murder. There is no requirement that defendant actually be present and commit the homicide. Utah Code Ann. § 76-2-202 (Utah 1978).

Based upon the above argument it is clear that the instruction on second degree murder was proper. However, even assuming the instruction was erroneously given, this Court has stated that "where a jury finds the defendant guilty of a greater offense, the giving of an erroneous instruction on a lesser offense is not deemed prejudicial." State v. Valdez, 30 Utah 2d 54, 513 P.2d 422, 424 (Utah 1973).

POINT V

SUFFICIENT EVIDENCE WAS PRESENTED TO CONVICT DEFENDANT OF FIRST DEGREE MURDER.

Defendant contends that the evidence introduced at trial was insufficient to convict him of the charged offense. He alleges that the only evidence presented at trial linking him with the murder was that of three known drug dealers who had as much motive for murdering the victim as defendant had.

This Court has stated:

> [W]e Review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

State v. Marcum, 74 Utah Adv. Rep. 6, 7 (Jan. 21, 1988) (citations omitted). Additionally, any inconsistencies in testimony does not warrant disturbing the jury's verdict, and go merely to the weight of the evidence and the credibility of the witnesses. Id. at 7.

There was sufficient evidence introduced at trial to convict the defendant. Defendant argues that the testimony of Brad Bromage, Lloyd Averrett and Jim Smith is uncorroborated and illogical. Lloyd Averrett testified that defendant came to Averett's house and threatened him and his family (R. 606). Debra Averrett also testified to defendant threatening her husband and family (R. 610). Defendant admits going to Lloyd's home in Clarkston (R. 1140). Jim Smith's testimony that defendant was threatening him is corroborated by his wife's testimony (R. 637). Paulette Smith testified that Jim stated he did not want to kill Piti (R. 1458). She also testified that defendant was frequently at their house before the murder (R. 1457).

It was apparently common knowledge that defendant had a falling out with Piti (R. 445). Both Scott Taren and Valerie Clark testified that defendant was angry with Piti about drugs (R. 445, 907). Piti owed defendant money in connection with the drug conspiracy (R. 483). Defendant was capable of killing Piti; and admited to threatening his own brother with a gun (R. 1235). He also admits to yelling at and threatening Piti (R. 1235). He explains it in a humorous light but admits to both acts.

Defendant also claims that Jim Smith's testimony is illogical. Jim Smith first stated that Brad and Lloyd helped him kill Piti. The next day however Jim changed his story about the killing and told his attorney that defendant hired Smith to kill Piti (R. 716, 719, 788). Defendant also questions the credibility of Smith's testimony as it relates to the payment

Smith would receive for killing Piti. The issue of credibility is one for the jury. Smith could have believed that defendant was wealthy. Defendant drove a corvette and once asked Paulette Smith if she would like one (R. 1462). Sherry Vosper showed Jim Smith the diamond ring that defendant had given her (R. 468). Finally, defendant continuously referred to his connections in Park City as supporting him (R. 635). Jim Smith thought that the Park City connections were assisting in the payment for Piti's death (R. 793). The evidence when viewed in the light most favorable to the verdict supports defendant's conviction.

POINT VI

NO PROSECUTORIAL ERROR OCCURRED WARRANTING A NEW TRIAL.

Defendant contends that the prosecutor misstated in closing argument the immunity granted to Brad Bromage regarding the murder, and that this misstatement vested Bromage with greater credibility as a witness.

Defendant admits that he failed to object to the alleged misstatement at trial, and absent manifest error he is barred from raising an argument on appeal not objected to at trial. Utah R. Evid. 103(a)(1); State v. McCardell, 652 P.2d 942 (Utah 1982). In State v. Tillman, 72 Utah Adv. Rep. 6, 7 (Dec. 22, 1987) this Court stated that it would consider all claims raised in capital cases on appeal even if no proper objection was made at trial.

The State is of the view that when the sentencing body has not selected the death penalty this Court's position on waiver in capital cases is inapplicable and the general rules

regarding waiver should be enforced. Although defendant moved for a new trial on the ground of prosecutorial misconduct, the objection to the misstatement was not timely and should not preserve defendant's argument for purposes of appeal. This Court made the following statement in Tillman regarding "invited error":

> Indeed, it is the rule that if improper statements are made by counsel during a trial, it is the duty of opposing counsel to register a contemporaneous objection thereto so that the court may make a correction by proper instruction and, if the offense is sufficiently prejudicial, declare a mistrial. . . . Fairness requires that if defendant objected to the prosecutor's argument, he, through his attorney, should have made such objection known at the earliest opportunity.

Tillman, 72 Utah Adv. Rep. at 13. Assuming this Court decides to address the merits of defendant's argument, the following analysis is provided by the State.

The prosecutor made the following statement in closing argument:

> Brad Bromage, I gave immunity. I brought him here in the investigative subpoena. You heard the immunity. You have got immunity on the death of Piti Srisi-Ad and the drug dealings you have had, and now you have to answer my questions. A person can't take the Fifth Amendment and not answer when I have granted immunity. You can't incriminate yourself if I can't charge you. Brad Bromage could have said I did it, I am the one who did it. I couldn't have charged him. I have granted immunity. That's permanent and lasting.

(R. 1879). Defendant claims that this statement was erroneous because Bromage was never granted immunity for the murder, but only for the drug transactions. It is unclear from the record

whether Bromage was granted immunity for the murder. The following exchange occurred during direct examination of Bromage.

Q: Now you have previously been in to testify I think at the Preliminary Hearing, and one other investigative hearing some months ago?

A: Yes.

Q: At that point you were granted by myself, as County Attorney, immunity for your involvement in drug transactions prior to May 16th of this year?

A: Transactional immunity.

Q: Right, you understand that don't you?

A: Yes, I do.

Q: I think Don Sharp was your attorney at those hearings. He sat through the Preliminary and also the Investigative Hearing?

A: Yes.

Q: You understand the testimony that you may give, that gives you--or incriminates you in your use or selling of drugs can't be held against you at this point, you understand that?

A: It cannot be.

Q: Right.

A: Okay, I understand.

Q: I notice Mr. Sharp isn't here. Is it your intent to go ahead without his presence?

A: Yes, it was.

Q: Do you have any questions about the immunity before you go on?

A: It is total immunity.

Q: As far as any drug transaction, you can't be charged with any of those items.

A: I can't be charged with anything.

Q: The things you are testifying about, that's true. If there are other things we learn about, we will charge you with those.

A: I understand.

(R. 516-17).

In reviewing an allegation of prosecutorial misconduct, this Court:

> must determine if the prosecutor's remarks calls to the attention of the jurors matters they would not be justified in considering in reaching the verdict and, if so, whether there is a reasonable likelihood that the misconduct so prejudiced the jury that there would have been a more favorable result absent the misconduct.

State v. Speer, No. 860112 slip op. at 5 (Jan. 26, 1988) citing State v. Tillman, 72 Utah Adv. Rep. 6, 9 (Dec. 22, 1987). In determining whether a remark is prejudicial the alleged misconduct must be viewed in light of the totality of the trial and the trial court's ruling on this matter will not be overturned absent an abuse of discretion. State v. Speer, No. 860112, slip op. at 5 (January 26, 1988).

This Court has determined that in closing argument a party has considerable freedom. "Counsel for both sides have considerable latitude in their [closing] arguments to the jury; they have a right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom." State v. Lafferty, No. 20740 slip op. at 25 (Jan. 11, 1988) citing State v. Valdez, 30 Utah 2d 54, 60, 513 P.2d 422, 426 (1973).

In this case no error occurred. First, it is not clear the prosecutor called attention of the jurors to matters outside of the record. Bromage stated on the record that he understood that he could not be charged with anything and the prosecutor confirmed that he could not be charged with anything he testified about, which would include the murder (R. 517).

Even assuming that Bromage was not granted immunity for the murder, defendant provides no analysis that the misstatement so prejudiced the jury that there was a strong likelihood of a more favorable verdict absent the misstatement. The jurors were instructed that argument by the attorneys was not evidence in the case:

Instruction No. 18

> Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.
>
> Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated.
>
> Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.
>
> Unless you are otherwise instructed, anything you may have seen or heard outside of the courtroom is not evidence, and must be entirely disregarded.

(R. 154).

The prosecutor's statement regarding credibility of Bromage is confusing at best. Assuming, as defendant argues, that Bromage was not granted immunity for the murder, the jury would have been aware of that fact and taken it into account when judging his credibility, i.e. that he was lying to cover up for his illegal conduct. On the other hand, assuming that Bromage was given immunity for the murder this fact in the minds of most jurors would make him a less credible witness, since he would be testifying only because of the grant of immunity and was likely saying what the prosecutor wanted to hear. In any event, the prosecutor's statements did not prejudice defendant such that there was a likelihood of a more favorable result.

CONCLUSION

Based upon the foregoing arguments the State requests this Court to affirm defendants conviction.

DATED this 25 day of February, 1988.

DAVID L. WILKINSON
Attorney General

Kimberly K. Hornak

KIMBERLY K. HORNAK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Deirdre A. Gorman, attorney for defendant, 205 26th Street, Suite 34, Ogden, Utah 84401, this 25 day of February, 1988.

Kimberly K. Hornak